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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GROSSMONT UNION HIGH SCHOOL  
DISTRICT,

Plaintiff and Appellant,

v.

COMMISSION ON PROFESSIONAL  
COMPETENCE,

Defendant and Respondent;

MICHAEL KLINKERT,

Real Party in Interest.

D052932

(Super. Ct. No. GIE036728)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

Michael Klinkert, a special education teacher with the Grossmont Union High School District (the District) since 1977, and the real party in interest in the matter, appealed his notice of termination as a permanent certified teacher by the District to the respondent Commission on Professional Competence (the Commission). The District

based his dismissal upon the allegation he showed, under Education Code<sup>1</sup> section 44932, subdivisions (a)(5) and (7), "evident unfitness for service" and "persistent violations of law."

The Commission determined that cause for dismissal did not exist and reinstated Klinkert's employment with the District. The District filed a petition for writ of mandate (the petition) with the Superior Court of San Diego County. The court denied the petition, finding the District failed to show the Commission's findings were not supported by the weight of the evidence.

The District appeals, again asserting there is no substantial evidence to support the Commission's reinstatement of Klinkert. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. Klinkert's Employment with the District*

Klinkert has been a special education teacher in the District since 1977. He was elected by his peers as a department chair in 1990 and placed in charge of the Viking Center. The Viking Center is a school for severely handicapped and medically fragile students. There are six teachers, over 30 employees, three classrooms for medically fragile students, and two classrooms for students with behavioral issues. As a result of Klinkert's service as department chair from 1990 to 2004, he received a distinguished service award. According to Klinkert, he stayed in special education so long because he liked it and was "good at it." He developed a "well-deserved reputation as being a

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<sup>1</sup> All further statutory references are to the Education Code unless otherwise specified.

dedicated and skillful Special Education teacher. Quite often, students who were no longer welcome in traditional classes and who were believed to be on their way to nonpublic schools were assigned to [Klinkert's] class. These students were sometimes referred to as 'Mike Klinkert's kids.' [Klinkert] was regularly assigned to teach physically aggressive students with significant developmental disabilities including autism." Most of his students came from other schools where they were unsuccessful because of aggression, acting out or assaults. They were being considered for nonpublic school placement due to the difficulty in handling them, and they were given one last chance of staying in the public school system by going into Klinkert's classroom. Assaults on staff members occurred on a daily basis.

Klinkert's last evaluation dated June 9, 2005, stated, "Good job, Mike."

*B. The Misconduct*

Klinkert admitted that from the end of summer school 2005 to October 2005, consistent with the strategy he had recently developed to deal with the highly aggressive behavior by certain students, he withheld food from a student named Gus on about 10 occasions, he withheld food from a student named Steven on three or four occasions, and he withheld food from a student named Amy on one occasion. On a handful of occasions, Gus and Steven had an entire afternoon without any lunch because they did not stop misbehaving. Amy never went a full afternoon without lunch. No student in Klinkert's class ever went the entire day without having breakfast or lunch.

Gus was "generally assaultive and had property destruction issues." In his previous school, two aides were assigned to control his behavior. Gus did not have an aide of his own in Klinkert's classroom.

According to Klinkert, he and Rose Tagnesi, the assistant director of special education for the District, were trying to come up with methods to control Gus's behaviors. Klinkert testified that Gus "was very plugged into food as a reinforcer" and that "the idea was that I wouldn't withhold food for the entire day," but would "simply delay [Gus's] lunch and tell him he was going to eat last." However, Klinkert admitted that sometimes when Gus continued to act out, he did not get his lunch at all.

Steven engaged in "sexually oriented assaults against other students and staff." According to Klinkert, Amy's mother gave him permission to withhold food from her.

Instructional aide Sheri Gardner spoke to Klinkert about the withholding of food on November 1, 2005, and foul language used by staff in the classroom. Klinkert immediately stopped the withholding of food and addressed the issue of foul language at the next staff meeting. According to Klinkert, he "told her she was right. And we had gotten into a bad [habit] using that as a crutch to deal with the behaviors, and I stopped it immediately. We were . . . not using it that much anyway."

Klinkert would on occasion instruct Gus to cover himself with a blanket so that he would compress and settle down. The students often did this themselves when they would overload on stimuli, especially those on psychotropic drugs which make them very sensitive to light and sound. He would tell Gus to cover up as an alternative to a time out. Administrators had previously observed Klinkert using this technique and said

nothing about it nor that he was required to document the action. He did not believe he needed to document because he "didn't use it as a behavior plan."

Gardner testified that Klinkert did not use foul language, but was present when such language was used by staff. She also testified he was not present during the most egregious language she heard. Klinkert admitted that when staff were struck or bitten they may have said something like, "Oh, shit" in response. He also admitted that there was joking among male staff members that included the use of foul language. However, these exchanges took place out of the presence of students. When it came to his attention that a staff member directed foul language at a student in response to a sexual assault by the student, he directed the staff member to desist from using such language.

According to Gardner, Klinkert took to heart what she said. Gardner testified that Klinkert was a professional and compassionate teacher.

Klinkert testified that if he returned to the classroom he would not withhold meals as a behavioral intervention. He understood it was inappropriate, and it would not be repeated. With respect to the blanket technique, he stated he would document its use in the future.

Gardner reported the withholding of meals and use of foul language to the chairperson of the Viking Center.

### *C. The Investigation*

An investigation was instituted. In the investigation, and in the Commission hearing, Klinkert admitted that he delayed or withheld meals as a form of discipline for "aggression, failure to follow commands, and physical resistance." He also admitted he

did not document the withholding of food. There was no evidence presented that the withholding of food had occurred previously in Klinkert's 29 years of teaching.

Klinkert also discussed with the District, and testified at the Commission hearing, that certain students liked to cover up with a blanket when they became agitated and that administrators had observed him using this technique and said nothing about it, nor that he was required to document the action.

Finally, Klinkert acknowledged during the investigation, and testified at the hearing, that there were occasions when staff used foul language such as when they were physically assaulted by the students, but he believed the students were too far away to hear and understand what was being said. On the one occasion he learned something inappropriate was said directly to a student, Klinkert told staff it was inappropriate.

The District sent a letter to Klinkert's students' parents, advising them of an allegation of misconduct relating to behavioral modification practices not contained in the students' independent education plans (IEP's), i.e., the withholding and depriving students of food and the use of blankets to cover up. The District met with the parents. No claim or complaint was filed by any parent.

#### *D. Reprimand and Notice of Dismissal*

The District served Klinkert with a letter of reprimand, which described his alleged misconduct as: "(1) [W]ithholding and depriving students of meals as a behavior intervention strategy, (2) using blankets to fully cover students as a behavior intervention strategy, and (3) continuously engaging in the use of foul language and inappropriate jokes around students." The District notified the California Department of Education and

filed child abuse reports against Klinkert. There was no action taken against Klinkert based upon the notification to the State or the filing of the child abuse reports.

The District notified Klinkert it intended to dismiss him from employment and served him with an "Accusation and Notice of Charges." The accusation stated the same alleged misconduct as the letter of reprimand. In December 2005 the District placed Klinkert on administrative leave.

#### *E. Appeal and Commission Decision*

Klinkert appealed the notice of termination to the Commission. The Commission is a legislatively mandated professional hearing tribunal, with experience and expertise in the area of determining fitness to teach. The hearing panel included an administrative law judge from the Office of Administrative Hearings, one member appointed by the District (a special education administrator for the San Diego Unified School District) and one member appointed by Klinkert (a special education teacher from the Baldwin Park Unified School District). A full evidentiary hearing was held in November 2006. The District and Klinkert each had the opportunity to call witnesses and to enter documentary evidence. The Commission issued its decision in December 2006. It voted two-to-one to dismiss the charges against Klinkert, finding he was fit for employment. The Commission member appointed by the District dissented.

Based upon the testimony and evidence discussed, *ante*, the Commission found that Klinkert "acted unprofessionally by delaying and sometimes withholding lunch as an unauthorized disciplinary measure, by not looking more closely into whether telling Gus to 'cover up' was a form of discipline, and by permitting foul language to be used in his

classroom because there was a possibility it might be overheard and understood by students."

However, the Commission also found Klinkert "was forthright in his dealings with District administrators. . . .He did not try to blame others for what happened. [¶] [Klinkert] testified in a credible fashion and appeared to be remorseful." The Commission also noted that Klinkert immediately "discontinued the practice when a teacher's aide expressed concern. The administration was not required to intervene."

Klinkert at all times admitted and never tried to excuse or justify his misconduct. The Commission found that the misconduct lasted "for less than three months," that it was "limited to three special education students, and it did not occur more than a dozen times. On a handful of times, one student went without lunch for a full afternoon."

The Commission further found that "it is unlikely that the questioned conduct will recur. [Klinkert] stopped the offensive discipline [of the students] as soon as it was brought to his attention. He did not resume such discipline before the District began its investigation. As a result of that investigation, the letter of reprimand, being the subject of child abuse reports, being reported to the California Department of Education, being placed on administrative leave, and being subjected to a dismissal proceeding, it is unimaginable that [Klinkert] would engage in the same or similar misconduct. This teacher has learned his lesson."

The Commission concluded that the evidence did not show Klinkert exhibited an "evident unfitness" to teach as the "misconduct did not evidence a fixed character trait and the misconduct was remedied," and the "unprofessional conduct was not caused by



any defect in temperament." The Commission found the District had not met its burden of showing "persistent" violations of law as Klinkert "was not stubborn, persevering, and refusing to relent in his course of conduct, especially when faced with mild opposition." The Commission also noted that its decision "should not be viewed as an endorsement of [Klinkert's] conduct. Far from it; the evidence established [he] acted unprofessionally . . . ." However, his misconduct "was not so egregious as to warrant the extreme sanction of dismissal."

#### *F. Petition and Court's Order*

In February 2007 the District filed its petition with the Superior Court of San Diego County. The District challenged the Commission's decision, alleging it abused its discretion and the weight of the evidence did not support a dismissal of the charges.

The court upheld the Commission's decision: "The [District's] writ of mandate is denied. [The District] has failed to show that the administrative findings were not supported by the weight of the evidence." There were no written findings of fact and the District did not request a statement of decision. However, at oral argument the court stated that Klinkert was forthright and honest in his testimony and did not try to hide anything. The court also noted the fact that although there was an investigation, no child abuse charges were ever brought by the state, and no parent filed a complaint of any kind.

## DISCUSSION

### *I. STANDARD OF REVIEW*

Code of Civil Procedure section 1094.5 provides a trial court reviewing the decision of an administrative agency exercises its independent judgment in reviewing the

evidence; and that an "abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." Under the independent review standard, the trial court may weigh the credibility of witnesses. (*Pittsburg Unified School District v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 977 (*Pittsburg*).)

After the superior court makes an independent judgment upon the record of an administrative proceeding, the scope of review on appeal is limited. (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180 (*San Dieguito*).) We must sustain the trial court's findings if they are supported by substantial evidence. (*Pittsburg, supra*, 146 Cal.App.3d at p. 978.) In reviewing the evidence, we resolve all conflicts in favor of the party prevailing at the trial court level and must give that party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deduction for those of the superior court. (*Governing Board of ABC Unified School District v. Haar* (1994) 28 Cal.App.4th 369, 378.)

Moreover, as noted, *ante*, the District did not request a statement of decision. "In a nonjury trial appellant preserves the record by requesting and obtaining from the trial court a statement of decision pursuant to California Code of Civil Procedure section 632. The statement of decision provides the trial court's reasoning on disputed issues and is [the appellate court's] touchstone to determine whether or not the trial court's decision is supported by the facts and law. [Citations.] . . . *In the absence of a statement of decision,*

*the appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record.*" (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718, italics added.) Thus, this court must presume the trial court found every fact necessary to support its decision.

## II. ANALYSIS

### A. *Evident Unfitness to Serve*

The District asserts that there is no substantial evidence to support the conclusion that Klinkert was fit to serve as a teacher because "no reasonable teacher . . . could conclude that a parent of an autistic student would agree to intentionally deprive a student of food from morning until the end of a school day." This contention is unavailing.

Section 44932, subdivision (a)(5) provides that a permanent employee of a public school district may not be "dismissed except for one or more of the following causes: [¶] . . . [¶] (5) Evident unfitness for service." In the context of a teacher, " 'evident unfitness for service' " . . . means 'clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.' Unlike 'unprofessional conduct,' 'evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444, fn. omitted (*Woodland*).)

In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*), our Supreme Court articulated criteria for assessing whether a teacher's conduct makes him or her unfit to teach. They include "the likelihood that the conduct may have adversely

affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers." (*Id.* at p. 229, fns. omitted.)

Furthermore, a commission on professional competence has discretion to require the retention of a teacher despite findings that would support a finding of unfitness to teach. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222 (*Burman*).) Section 44932 provides that a teacher cannot be dismissed unless certain grounds are found to exist, but "does not provide that a teacher *must* be dismissed if one of those grounds is found." (*Burman, supra*, at p. 218.) A commission has power "to exercise its collective wisdom and discretion to determine that dismissal is not appropriate in a given case." (*Id.* at p. 222.)

In addition, the selection of a particular penalty by an administrative agency generally is reviewed under the abuse of discretion standard even where the superior court reviews the evidence under the independent judgment standard. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45-47.) Neither a trial nor an appellate court can reverse an agency's determination of the appropriate disciplinary action unless the agency has acted arbitrarily or capriciously. (*Id.*, at p. 46; *West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1778-1779.)

Here, without any analysis of the applicable authority, and in one paragraph in its opening brief, the District claims there is *no* evidence to support the Commission's exercise of its discretion to dismiss the charges, and that Klinkert's actions demonstrated an "evident unfitness" to teach. This contention is unavailing.

The Commission properly considered Klinkert's long history of exemplary service, his candor and remorse, and his cessation of the offensive conduct when it was brought to his attention. The Commission also properly considered the fact his motivation was not malevolent. Even the teacher's aide who felt compelled to report him testified he was a professional and compassionate teacher. While we cannot condone Klinkert's misconduct and agree with the Commission's conclusion that it was unprofessional, we also recognize the difficulties teachers such as he encounter in teaching such severely disabled students, ones who often have been unable to function at other public schools, and are, as the Commission recognized, often disruptive and physically aggressive. Klinkert cannot be described as a teacher with a "a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Woodland, supra*, 2 Cal.App.4th at p. 1444.) We also find it relevant, as did the Commission, that no parent filed a complaint in this matter, and the State of California took no action on the District's report of child abuse.

We also are of the opinion that after the District's treatment of Klinkert, reporting him for child abuse, trying to fire him, placing him on administrative leave, forcing him to appeal to the Commission and testify concerning these matters, there is little chance of the misconduct recurring.

The District asserts the *Morrison* factors do not support a dismissal of the charges because (1) he only stopped the misconduct because he was "caught 'red-handed'" and was only remorseful as "a way to try to retain [his] job." However, the District points to no evidence to support this assertion and is only rearguing issues resolved against it by the Commission and the trial court. There is no evidence Klinkert ever tried to hide his actions, but rather he operated openly. The Commission, who was in the best position to judge whether he was truly remorseful, found Klinkert credible and honest.

Further, because the District did not request a statement of decision, we presume that the trial court made all factual findings necessary to support the judgment. (*Slavin v. Borinstein, supra*, 25 Cal.App.4th at p. 718.)

Finally, even if there were sufficient evidence from which the Commission could determine Klinkert "unfit" to teach, it was not required to order a termination. Rather, it could properly exercise its discretion, based upon the facts peculiar to Klinkert's circumstances, to order the charges dismissed. (*Burman, supra*, 45 Cal.3d at p. 218.) A commission has power "to exercise its collective wisdom and discretion to determine that dismissal is not appropriate in a given case." (*Id.* at p. 222.) Thus, the Commission acted within its discretion in determining a dismissal was not appropriate given Klinkert's honesty and remorse, as well as his 30 years of exemplary service to the District, in what can only be described as one of the most challenging positions a teacher could be placed

in. The Commission in no way condoned Klinkert's misconduct. Rather, it determined the District's notice of termination was, under the circumstances, extreme.<sup>2</sup>

We also note that when faced with the allegations of misconduct, and after its investigation, the District could have imposed some type of discipline short of termination. (§§ 44932, 44934, 44944.) However, because the District recommended dismissal for cause, the Commission could only vote for or against that recommendation. It has no power to dispose of the charge by imposing a lesser or alternative sanction. (See § 44944, subd. (c)(1)-(3).)

#### *B. Persistent Violations of Law*

The District asserts there is no evidence to support the Commission's decision because "as a matter of law" Klinkert engaged in "persistent" violations of state regulations that prohibit behavior modification based upon inadequate food being provided. The District makes this allegation based on the fact "the acts [were] constantly repeated over a three months period" and were "stubborn." We reject this contention.

Section 44932, subdivision (a)(7) provides that a permanent teacher may also be discharged for "[p]ersistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her." The regulation at issue here is title 5, California Code of Regulations, section 3052,

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<sup>2</sup> Because the District does not discuss the alleged foul language used by staff and the use of a blanket to cover students in regard to this issue, we need not address these items in our discussion.

subdivision (1), which provides in part: "No public education agency, or nonpublic school or agency serving individuals pursuant to Education Code Section 56365 et seq., may authorize, order, consent to, or pay for any of the following interventions, or any other interventions similar to or like the following: [¶] . . . [¶] (3) Any intervention which denies adequate sleep, food, water, shelter, bedding, physical comfort, or access to bathroom facilities."

Courts interpreting subdivision (a)(7) of section 44932 have focused on whether there has been a pattern of refusal to obey rules and whether an employee was intentionally insubordinate. For example, in *Midway School District of Kern County v. Griffeath* (1946) 29 Cal.2d 13 (*Midway*), the California Supreme Court upheld the decision to reinstate a teacher who called in sick but in actuality went deer hunting. In doing so, the Court of Appeal noted that the trial court "determined that the one instance of violation under the circumstances, together with the frank answers indicating the defendant's state of mind, did not constitute unprofessional conduct or dishonesty such as would unfit him for the performance of his duties as a teacher." (*Id.* at p. 18.) The high court also concluded the trial court was reasonable in finding "one instance of disobedience of the school regulations did not necessarily show persistence. Persistence, in the sense intended, is referable to past conduct. The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered persistent. . . . The emphasis is on 'persistent' and 'continually.' The trial court expressly found that the defendant was not motivated by an attitude of insubordination." (*Ibid.*)



Similarly, in *Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77 (*Oakdale*), the Court of Appeal reversed a judgment for a school district in an action for dismissal where a special education teacher requested a leave of absence to accompany her husband abroad to study foreign special education programs. The district never responded to her request, and she returned to school a month after the school year started. The Court of Appeal held that under the circumstances, the teacher's violation of the school's regulations were not "persistent." (*Id.* at p. 82.) In doing so, the Court of Appeal rejected as "specious" the district's argument that every day she was absent was a separate violation and demonstrated the "persistent" requirement of the statute: "This is not a case where it is reasonable to say that Mrs. Seaman's absence, by its very duration, amounted to a 'persistent' violation of the governing board's rules. [Citation.] Nor can it fairly be said from the evidence presented that the teacher was motivated by an attitude of continuous insubordination. Mrs. Seaman had been employed by the district for a period of eight years, and there is no evidence in the record to prove that she ever violated a school law or a regulation of the governing board prior to the incident in question; before leaving on her trip, appellant requested a leave of absence and gave sound academic reasons in support of the request; although the teacher left on her trip with knowledge that the motion to grant her request for a leave of absence had failed to pass for lack of a second, she reasonably could have assumed, as she testified, that the request had not been denied emphatically; appellant made a second request for a leave of absence from Yokohama, Japan, at a time when she could have returned for the commencement of the school year had she received a reply to her letter or a demand that she return. [¶] To hold

that Mrs. Seaman was guilty of 'persistent' violation of the school board's regulations under the evidence presented in this case, even though the violation resulted in an absence of several school days, is to distort the meaning of the term 'persistent,' no matter what acceptable definition is used. The word 'persistent' is defined by lexicographers as 'refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.' [Citation.] And in the judicial decisions of this, as well as other states, the word has been interpreted to mean 'continuing or constant.' [Citations.]" (*Id.* at pp. 81-82.)

Likewise in this case there is substantial evidence to support the Commission's finding Klinkert's actions did not constitute a "persistent" violation of the law. There is no evidence that Klinkert was acting in an insubordinate manner. Quite the opposite; when his actions were questioned, he immediately stopped.

Further, the District's argument that because the misconduct occurred over a two to three month period it was "persistent" is as unavailing as the school board's position in *Oakdale*. As the Court of Appeal held in that case, "persistent" means " 'refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.' [Citation.]" (*Oakdale, supra*, 28 Cal.App.3d at p. 82.) As stated, *ante*, "The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered . . . persistent. . . . The emphasis is on 'persistent' and 'continually.' The trial court expressly found that the

defendant was not motivated by an attitude of insubordination." (*Midway, supra*, 29 Cal.2d at p. 18.)

There was likewise no evidence presented in this case that Klinkert acted in an insubordinate manner once the misconduct was discovered. Moreover, given his dedication and exemplary record of employment, the Commission properly exercised its discretion in determining there was an opportunity for correction. As the Commission appropriately recognized, given the fact he was reported for child abuse, was notified he was being terminated, and had to go through the appeal process before the Commission, it is unlikely that such misconduct will reoccur.

#### DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

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NARES, Acting P. J.

WE CONCUR:

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McDONALD, J.

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O'ROURKE, J.